89-434 (1)

No. _____

In The

United States Supreme Court

October term, 1988

Archie Julien,
Petitioner,

v.

Agnes S. Baker,
Respondent.

Petition for Writ of Certiorari

to The Texas Supreme Court

Archie W. Julien, Pro Se
909A Foster
College Station, TX 77840

(409) 693-8538

38 pp

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QUESTIONS PRESENTED FOR REVIEW

This case involves a claim of adverse possession of a 6.85' X 235' strip of land. The crux is a 70'-long row of hedges along the middle one-third of the strip's length. Petitioner claims the Texas Supreme Court arbitrarily failed to follow legislated due process, as required where the Fourteenth Texas Court of Appeals held in conflict with statutes and case law. Petitioner claims the failure also denied equal protection.

1. Is the Texas Fourteenth Court of Appeals' holding: that a four foot (4') high hedge is a barrier or fence; in conflict with Texas Statutes and case law that a structure must be at least five feet (5') in height in order to be a fence?

2. Is the Fourteenth Court of Appeals' holding: that a hedge is a barrier or fence; in conflict with Texas case law that *no* hedge is a fence under any conditions?

3. Is the Fourteenth Court of Appeals' holding: that a hedge gives notice of adverse possession; in conflict with Texas case law that *no* hedge gives notice of adverse possession?

4. Is the Fourteenth Court of Appeals' holding: that a hedge in the middle one-third of the strip gives notice of adverse possession, and thus conveys an additional rear one-third of the strip that Respondent does not occupy; in conflict with Texas case law that even if some portion of land is in adverse possession, such possession does not extend to a portion not in actual adverse possession?

5. Is the Fourteenth Court of Appeals' holding: that a hedge in the middle one-third of the strip gives notice of adverse possession, and thus conveys an additional front one-third that Respondent only *mowed*; in conflict with Texas case law that *mowing* does not give notice of, nor convey land by adverse possession?

6. Does the Texas Government Code §22.001 §§(a)(2) name any of the type of conflict queried in 1. through 5.?

7. Does Rule 133 (b) of the Texas Rules of Appellate Procedure require the Texas Supreme Court, in cases of conflict named in §22.001 §§(a)(2), to either grant Appellant's application for writ of error, or explain its agreement with the Court of Appeals?

8. Did the failure of the Texas Supreme Court to follow Rule 133 (b), deprive Petitioner of his property without due process, in violation of the United States Constitution Amendments V and XIV?

9. Did the failure of the Texas Supreme Court to follow Rule 133 (b), deny Petitioner the equal protection of the laws, in violation of the United States Constitution Amendment XIV?

LIST OF PARTIES

All parties in this case appear in the caption. Petitioner JULIEN was the Appellant-Defendant below. Respondent BAKER was the Appellee-Plaintiff below. There are no entities to report or list pursuant to this Court's Rule 28.1.

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OTHER AUTHORITIES

OPINIONS BELOW

1. Original Judgment of the Texas District Court, July 7, 1987;
2. Opinion of the Texas Fourteenth Court of Appeals, September 15, 1988;
3. Fourteenth Court of Appeals denying rehearing, October 13, 1988;
4. Texas Supreme Court denying application for writ of error, February 22, 1989;
5. Texas Supreme Court overruling motion for rehearing, May 10, 1989.

JURISDICTIONAL STATEMENT

The Texas Supreme Court denied Petitioner's Application for Writ of Error on February 22, 1989. Petitioner timely filed a Motion for Rehearing March 7, 1989, denied May 10, 1989. Petitioner timely filed this Petition for Writ of Certiorari within 90 days of that date. The Texas Supreme Court's decision is a final judgment in a civil case. This Court has jurisdiction to review a decree made by the highest court of a State. 28 U.S.C. §1257.

CONSTITUTIONAL AND STATUTE PROVISIONS

UNITED STATES CONSTITUTION

Amendment V

No person shall be ... deprived of ... property, without due process of law ...

Amendment XIV, Section 1

... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TEXAS LAW

Texas Government Code §22.001 §§(a)(2)

(a) The supreme court has appellate jurisdiction, except in criminal law matters, coextensive with the limits of the state and extending to all questions of law arising in the following cases when they have been brought to the courts of appeals from appealable judgment of the trial courts:

... (2) a case in which one of the courts of appeals holds

differently from a prior decision of another court of appeals or of the supreme court on a question of law material to a decision of the case.

Rule 133 (b) of the Texas Rules of Appellate Procedure

(b) Conflict in Decisions. In cases of conflict named in subsection (a)(2) of section 22.001 of the Government Code, the Supreme Court will grant the application for writ of error, unless it is in agreement with the decision of the court of appeals in the case in which the application is filed. In that event said Supreme Court will so state in its order, with such explanatory remarks as may be deemed appropriate ...

STATEMENT OF THE CASE

FACTS

The testimony and the photographic and plat drawing exhibits reveal the following facts. Respondent BAKER bought her house on platted Lot 13 (roughly rectangular 90' X 235') in 1958. A Mr. Harrison did an inaccurate survey for the purchase.

Respondent maintained, by mowing, a lawn at the front and side of her house up to the incorrectly presumed boundary line with Lot 14. (Petitioner JULIEN bought Lot 14 in 1985.)

Respondent also planted a 4' high, 70' long hedge of bushes along the middle of the length of the presumed boundary line with Lot 14. The hedge begins at the rear corner of Respondent's house (about 75' from the front of the lot) and extends rearward along the boundary line to a point about 145' from the front of the lot.

The remaining 90' along the boundary line, from the back of the hedge to the rear of the lots, has remained uncultivated and allowed to develop naturally into an impassable, wooded area.

In 1966, Respondent retained Spencer J. Buchanan and Associates to do a new survey performed by a Mr. Kling. The new survey revealed the Harrison survey to be incorrect. The Kling survey revealed that the Harrison survey had incorrectly incorporated into Lot 13, a rhombic strip of Lot 14: 6.85' wide at the front and extending 235' rearward to a width of 1.45' at the rear. The said 70' long hedge was planted in the center of the length of this 235' long strip. Mr. Kling immobilized iron rod survey markers in concrete at the true corners of Lot 13.

The Kling survey maintained the Respondent's Lot 13 frontage of 90', but shifted the whole frontage away from Lot 14 by about 6.85'. With the additional clearance now revealed on the Lot 12 side of Lot 13, Respondent installed a concrete driveway where there had been formerly not

enough clearance at that side of the house. Respondent has continued to mow the grass in the front 75' of the disputed strip and trim the hedge a couple of times a year. This situation forms the basis for the dispute of adverse possession. Respondents' exhibits consist of photographs of the disputed strip, and a copy of the incorrect Harrison survey.

INTRODUCTION OF ISSUES INTO THE COURTS BELOW

District Court: Petitioner raised an issue whether Respondent's activities gave notice of adverse possession. (Statement of Facts - S.F., p 61). The court entered judgment against Petitioner. A Finding of Facts and Conclusions of Law are not available because Petitioner filed the request later than ten days after judgment.

Fourteenth Court of Appeals: Petitioner again raised an issue about giving notice of adverse possession. (Appellant's Brief, pp. 8 - 9).

The Court of Appeals' Opinion states on page 6,

> "We hold that planting a hedge on the asserted property line of the tract to create a barrier or 'fence' between the properties is a sufficiently permanent, visible and unequivocal act to evidence a hostile character of possession which is sufficient to give notice to the true owner of the claimant's adverse possession."

Petitioner filed a motion for rehearing challenging whether a hedge could be a fence or give notice according to statutes and case law. (Motion for Rehearing, p. 3). The court denied the motion for rehearing.

Texas Supreme Court: Petitioner raised an issue whether the Court of Appeals' holding was in conflict about: 1. statutory height requirements for fences; 2. other courts holding that hedges are not fences; 3. other courts holding that hedges do not give notice of adverse possession; 4. case law that adverse possession is not extended into areas not in actual adverse possession; and 5.

mowing does not give notice of adverse possession. (Citation of Additional Authority, p. 2; Application for Writ of Error, pp. 4 - 9). The Texas Supreme Court denied Petitioner's Application for Writ of Error.

Petitioner filed a Motion for Rehearing raising the issues of *Denial of Equal Protection* and *Denial of Due Process*. The basis was that the Texas Supreme Court did not follow Rule 133 (b) of the Texas Rules of Appellate Procedure in the case of a conflict. (Motion for Rehearing pp. 5 - 6). The Court overruled Petitioner's motion for rehearing.

REASONS RELIED ON FOR WRIT

The Texas Supreme Court erred in substantially violating petitioner's rights under U.S. Constitution Amendment V,

> "No person shall be ... deprived of ... property, without due process of law ... ,"

and Amendment XIV, section 1.,

> "... nor shall any state deprive any person of life, liberty, or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The violation occurred because the Texas Supreme Court did not follow the legislated due process required by Rule 133 (b) of the Texas Rules of Appellate Procedure. In the case of a conflict between a decision of an appellate court and case law, the Rule requires the Texas Supreme Court to either: 1. grant petitioner's application for writ, or 2. to deny petitioner's application and explain the agreement with the court of appeals.

In the following pages, Petitioner submits argument and authorities to illuminate the conflicts presented in the **QUESTIONS PRESENTED FOR REVIEW**. Petitioner next submits argument and authorities to show that the Texas Supreme Court's failing to follow Rule 133 (b) is a denial of legislated due process and equal protection.

I. CONFLICT OF LAW NO. ONE

(Restated)

THE COURT OF APPEALS HELD THAT THE RESPONDENT'S PLANTING OF A 3-1/2' TO 4' HIGH HEDGE IS A BARRIER OR FENCE; WHICH IS IN CONFLICT WITH STATE STATUTES AND CASE LAW THAT REQUIRE A STRUCTURE TO BE 5' TALL IN ORDER FOR IT TO BE A FENCE.

ARGUMENT AND AUTHORITIES FOR CONFLICT ONE

Respondent testified that she maintains the height of the hedges "around three-and-a-half, four feet," after planting them at an initial height of "about 18 inches." (S.F., pp. 18, - 19). Vernon's Ann. Civ. St. art. 3947 requires that every gardner shall make a fence,

> "at least five feet high..."

Subsequent notation describes the purpose of the law is for establishing liability regarding protection against stock running at large.

P.C. art. 1372 describes liability which may occur for an insufficient fence, and states,

> "An 'insufficient fence,' means a fence less than five feet high..."

The court in *Hoskins v. Huling, 2 Willson*, Civ. Cas. Ct. App. § 159, (Tex. Civ. App. 1884) stated,

> "A lawful fence in Texas is one which is not less than five feet high..." Rev. St. art. 2431; Pen. Code, art. 686 (Vernon's Ann. Civ. St. art. 3947; Vernon's Ann. P.C. art. 1372).

Respondent's hedge is less than the necessary five feet in height to be a fence according to the statutes and case law.

With respect to statutory minimum height requirements for a fence, the case at bar is the only contrary finding by a court in at least 105 years.

II. CONFLICT OF LAW NO. TWO

(Restated)

THE COURT OF APPEALS HELD THAT THE RESPONDENT'S PLANTING OF THE HEDGE CREATES A BARRIER OR FENCE; WHICH IS IN CONFLICT WITH CASE LAW ESTABLISHING THAT HEDGES PLANTED ANYWHERE, ANYTIME, BY ANYONE, OF ANY HEIGHT ARE NOT INCLUDED IN THE MEANING OF THE FENCE STATUTES.

ARGUMENT AND AUTHORITIES FOR CONFLICT TWO

Although the Court of Appeals has stated a distinction between "pre-existing" and "claimant-planted" hedges, abundant case law shows there is no such distinction. 25 Tex. Jur. 2d, FENCES §1 Definitions, now supported in 2 Tex. Jur. 3d, ADJOINING LANDOWNERS §11 states,

> "A brick wall is a fence, but hedges of trees, shrubs or vines, or posts or stakes that have not been strung with wires or otherwise connected, do not constitute a fence. *Brown v. Johnson*, 73 S.W. 49; *Burch v. State*, 67 S.W. 500."

The court in *Surkey v. Qua*, 173 S.W.2d 230, 232 (Tex. Civ. App. - San Antonio 1943, writ dism'd wom) specifically examined the issue of a hedge planted by a claimant and its relationship to a fence by stating,

> "... she intended to <u>place the center line of the hedge</u> north of her claimed property line. ... Where owner of lot occupied dwelling house thereon, adverse claimant of three-foot strip of lot could oust possession of owner only by, and to the extend of, actual occupation, and mere occasional use of undefined area of strip to care for hedges, shrubs, and fences placed on

> boundary line between adjoining lots, without setting off strip by well-defined fence or inclosure, did not amount to such actual occupancy as would oust the constructive possessor."
> (Emphasis added.)

Conclusively, the court in *Brown v. Johnson*, 73 S.W. 49 at 50 expressly settled that a hedge planted by Appellant's father and intended to be a delineation between property boundaries

> "... is not a fence within Rev. St. 1895, art. 2502,"

and further stated,

> "... we are of the opinion that the word 'fence,' as used in the statute, has no reference to, and does not include within its meaning, a hedge. The common and usually accepted meaning of the word 'fence' is an inclosing structure of wood, iron, or other material, and such definition must have been in the mind of the Legislature when the articles in question were enacted."

It is not absolutely necessary in order to take property, that the person claiming limitation title should have

built the fences surrounding the property in question. *Nelson v. Morris*, 227 S.W.2d 586, 588 (Ct. App.). Since the person claiming limitation title does not have to build the fence to give notice of a hostile action, then a claimant-built fence has no more or less legal substance than a pre-existing fence.

If a claimant-planted hedge is equivalent to a claimant-built fence, then consistent logic requires that a claimant-planted hedge have no more or less legal substance than a pre-existing hedge. Therefore, holding that a planted hedge creates a fence requires the conclusion that a pre-existing hedge is a fence, as well.

By law, hedges planted by a claimant or anyone else are not a fence and therefore cannot be substituted as such. Normally fences are considered evidence of a notice of at least bare possession supporting a hostile claim of a propery line because a fence usually encloses property or prevents the intrusion from without or straying from within. *Lochwood Meadows, Inc. v. Buck*, 416 S.W.2d 623 (Ct.

App.). The evidence shows that the hedge in the case at bar was not a barrier or enclosure. There was about a 75' gap in the hedge in the front yard and about a 90' gap in the back yard. (See Plaintiff's Exhibits). Also, Respondent admitted that the hedge was so sparse that it couldn't keep a dog in or out. (S.F. p. 62).

With respect to any claimant-planted hedges being a barrier or fence, the case at bar is the only contrary finding by a court in at least 85 years.

III. CONFLICT OF LAW NO. THREE

(Restated)

THE COURT OF APPEALS HELD THAT PLANTING A HEDGE ON THE ASSERTED BOUNDARY LINE IS A SUFFICIENTLY PERMANENT, VISIBLE AND UNEQUIVOCAL ACT TO EVIDENCE A HOSTILE CHARACTER OF POSSESSION WHICH IS SUFFICIENT TO GIVE NOTICE TO THE TRUE OWNER OF THE CLAIMANT'S ADVERSE POSSESSION; WHICH IS IN CONFLICT WITH CASE LAW ESTABLISHING THAT PLANTING OR MAINTAINING HEDGES DOES NOT GIVE NOTICE.

ARGUMENT AND AUTHORITIES FOR CONFLICT THREE

Although the Court of Appeals has stated a distinction between "pre-existing" and "claimant-planted" hedges, abundant case law shows there is no such distinction. The planting of a hedge by a claimant, himself, or a member of claimant's family, or maintaining a pre-existing hedge located on a disputed parcel of land and keeping the land in the condition in which the claimant's grantor kept it, is not a hostile character of possession sufficient to give notice of an exclusive adverse possession.

The stated distinction does avoid conflict with *Bywaters v. Gannon*, 686 S.W.2d 593, where that court found that the "pre-existing" hedge that the subdivision developer had intended to plant on the boundary line did not give notice of adverse possession.

However, although it is not clear by the summary at the beginning of the opinions in *Miller v. Fitzpatrick*, 418 S.W.2d 884 (Tex. Civ. App. - Corpus Christi 1967, writ ref'd nre) and *Surkey*

v. Qua, 173 S.W.2d 230 (Tex. Civ. App. - San Antonio 1943, writ dism'd wom), the courts in both of these cases were considering shrubs or hedges planted by the actual claimants, themselves, and not just "pre-existing" hedges planted by predecessors. *Miller* at 887,

> "he fertilized and mowed the grass, cut the weeds, planted flowers and shrubs, and installed, in 1961, an underground drainage or irrigating system, and kept the property neat and tidy and made similar use of it as he did of the front yard of the property actually a part of Lot 2 to which he had record title."

Surkey at 231,

> "she intended to place the center line of the hedge north of her claimed property line."

In both cases, the courts found claimant-planted hedges did not give enough notice. Furthermore, an examination of *Brown v. Johnson*, clearly shows that the father planted their hedge to delineate the properties: *Brown v. Johnson*, 73 S.W. 49 at 49; but that doing so did not give notice of taking property.

The obvious reason is so the record owner will have the knowledge to protect his property. The persons claiming adverse possession must show that they manifested or brought their actions to the knowledge of the landowners in such a manner as to give them notice. 2 Tex. Jur. 2d, ADVERSE POSSESSION §62 states,

> "A claimant's acts are hostile if they are such as to notify the owner that his title is disputed. In other words, the real test of hostility is whether the acts performed by the claimant on the land and the use made of it were of such a nature and character as to reasonably notify the true owner of the land that a hostile claim was being asserted to the property. If the claimant's acts meet this test then his possession was adverse; if they do not, then the possession was not adverse. *Carter (W.T.) & Bro. v. Richardson*, (CA) 225 S.W. 816; *Harvey v. Peters*, (CA) 227 S.W.2d 867, reh. den.; *Arnold v. Jones*, (CA) 304 S.W.2d 400, reh. den.; *Miller v. Fitzpatrick*, 418 S.W.2d 884 (Ct. App.)."

In the case at bar, Respondent admits that the owners of Lot 14 never had any knowledge that any of the trees that she planted were on Lot 14. (S.F., p 61). She doesn't think that standing out there that you could tell if the hedges or the trees

were on Lot 14. (S.F., p 61). She never put up a fence on what she thought was a boundary line. (S.F., p 61). It is conclusive that even Respondent, herself, doesn't believe that she manifested or brought her actions to the knowledge of the landowners in such a manner as to give notice. The court in *McAdams v. Moody*, (Civ. App. 1899) 50 S.W. 628, found,

> "An owner must be held to know his own boundaries but an encroachment so slight that it may have readily occurred through mistake, and which does not actually appropriate any substantial part of a large tract of land and which is evidenced only by a fence, is not such actual visible appropriation as is required."

The legal definition of "fence" has specifically excluded bushes for 85 years. *McAdams* suggests that even if the bushes are a fence, it is immaterial since the encroachment was too slight to give notice. Again, Respondent herself admitted that the extent of the encroachment, which not only may have, but actually did occur through mistake, was too slight to give notice.

Although MILLER did actually plant bushes, in both the *Bywaters* and *Miller* cases the hedges were pre-existng as to the record owners against whom they were claiming limitation title. The record owners moved in after the planting so they had no idea who planted the shrubs or hedges. It is obvious in any case, that the significance of the actual shrubbery, grass, flowers and other plants would be that their visible presence would have to be the event giving the record owners notice of the hostile claim.

Case law shows that the planting of a hedge does not give any more notice than a pre-existing hedge, of the claimant's adverse possession to the true owner. Even if the hedge were a fence, it is Petitioner's position that the Court erred in holding that the slight encroachment of the "fence" was of sufficient extent that it is a hostile claim that gives notice.

With respect to a claimant-planted hedge giving notice, the case at bar is the only contrary finding by a court in at least 90 years.

IV. CONFLICT OF LAW NO. FOUR

(Restated)

THE COURT OF APPEALS EXTENDED ADVERSE POSSESSION INTO THE WOODED, IMPASSABLE SECTION OF THE DISPUTED AREA ALONG THE REAR ONE-THIRD OF THE BOUNDARY LINE; WHICH IS IN CONFLICT WITH ESTABLISHED CASE LAW THAT ANY LAND TAKEN BY ADVERSE POSSESSION MUST NOT EXTEND INTO ANY LAND NOT ACTUALLY IN ADVERSE POSSESSION.

ARGUMENT AND AUTHORITIES FOR CONFLICT FOUR

Any number of courts has already found that actual adverse possession of a part of a tract does not extend possession into another part not in actual adverse possession. The court in *W.T. Carter & Bro. v. Holmes*, (1938) 131 T. 365, 113 S.W.2d 1225, stated,

> "One who fenced and cultivated a remote and almost invisible part of a 100-acre tract, acquired no title by constructive ten year's possession to entire 100-acre tract."

The court in *Zapeda v. Hoffman*, (1903) 31 Civ. App. 312, 72 S.W. 443, harmoniously found,

"Where land was not inclosed, and one actually occupied a part, limitations did not run in his favor as regards the portion not actually occupied."

Similarly, the court in *Webb v. Lyeria*, (1906) 43 Civ. App. 124, 94 S.W. 1095, also determined,

"While it is not required that all land in the peaceable and adverse possession of one should be actually inclosed or improved, yet there must be at least peaceable and adverse possession thereof."

As already seen in *Surkey*,

"... adverse claimant of three-foot strip of lot could oust possession of owner only by, and to the extend of, actual occupation, ..."

Even though in the case at bar, the Court of Appeals found that the hedge was enough notice of adverse possession, that Court did not specifically find, and there is no justification for finding, that adverse possession should be extended into the rear 90' uncultivated, impassable

section of the disputed strip that was otherwise not in adverse possession.

The Court erred in taking the 90' rear portion of the disputed strip from Petitioner.

With respect to extending adverse possession into an area not actually in adverse possession, the case at bar is the only contrary finding by a court in at least 86 years.

V. CONFLICT OF LAW NO. FIVE

(Restated)

THE COURT OF APPEALS EXTENDED ADVERSE POSSESSION INTO THE MOWED SECTION OF THE DISPUTED AREA ALONG THE FRONT ONE-THIRD OF THE BOUNDARY LINE; WHICH IS IN CONFLICT WITH ESTABLISHED CASE LAW THAT MOWING IS INSUFFICIENT TO TAKE LAND BY ADVERSE POSSESSION.

ARGUMENT AND AUTHORITIES FOR CONFLICT FIVE

Previous case authorities have long held that mowing, located on a disputed

parcel of land and keeping the land in the condition in which the claimant's grantor kept it, is not a character of possession hostile enough to give notice of an exclusive adverse possession. *Francis v. Stanley*, (Civ App 1978) 574 S.W.2d 629; *City of Dallas v. Etheridge*, (1953) 152 T 9, 253 S.W.2d 640; *McDonald v. Weinacht*, (Sup 1971) 465 S.W.2d 136; *Bywaters v. Gannon*, 686 S.W.2d 593, 595 (Tex 1985); *Miller v. Fitzpatrick*, 418 S.W.2d 884, 890 (Tex. Civ. App. - Corpus Christi 1967, writ ref'd nre); *Surkey v. Qua*, 173 S.W.2d 230, 232 (Tex. Civ. App. - San Antonio 1943, writ dism'd wom).

Even though in the case at bar, the Court of Appeals found that the hedge was enough notice of adverse possession, that Court did not specifically find, and there is no justification for finding, either that mowing was sufficient notice of adverse possession, or for otherwise extending adverse possession into the front 75' mowed section that was otherwise not in adverse possession.

The Court erred in taking the front 75' mowed section of the disputed strip from Petitioner.

With respect to mowing giving notice, the case at bar is the only contrary finding by a court in at least 46 years.

DENIAL OF DUE PROCESS

Petitioner has stated many conflicts in law between the Court of Appeals' holding, and statutory and case authorities. Petitioner submitted these conflicts to the Texas Supreme Court for review, subject to Rule 133 (b). Case law shows that Rule 133 (b) is an instance of legislated due process. The Supreme Court did not follow the Rule, and denied Petitioner due process.

The Court in *White v. South Park Independent School Dist.*, U.S.C.A. Const. Amend. 14, 693 F.2d 1163, C.A. Tex. 1982 stated,

> "Due process requires agency to follow its own established procedures."

Even more succinctly, the court in *United States Ex Rel. Siegal v. Follette*, 290 F. Supp. 632 at 635 stated,

> "When a right is given by a state legislature, even though it is not a right protected by the federal constitution, the arbitrary denial of that right violates the Fourteenth Amendment. *American Ry. Express v. Kentucky*, 273 U.S. 269, 273, 47 S.Ct. 355, 71 L.Ed. 642 (1927); *Rudder v. United States*, 96 U.S.App.D.C. 329, 226 F.2d 51 (1955); *Randolph v. Willis*, 220 F. Supp. 355 (S.D.Cal. 1963)."

In *Randolph*, 220 F. Supp. 355, 358, that court characterized House rules,

> "... the rules of the House which are invoked here nonetheless provide in legal effect legislatively-established due process of law ..."

DENIAL OF EQUAL PROTECTION

In the many cases presented, those prevailing parties were able to enjoy certain protections and privileges of the law. Petitioner was similarly situated to the parties in the cases cited, but the

court arbitrarily denied the benefit of law to Petitioner.

The court in *Lewis v. Cohen*, 417 F.Supp. 1047, vacated and remanded 547 F.2d 162, on remand 443 F.Supp. 544, affirmed 98 S.Ct. 1572, 435 U.S. 948, 55 L.Ed.2d 797 stated,

> "Standards of review are identical either under the due process or equal protection clauses of the Fifth and Fourteenth Amendments, respectively."

Other courts have also recognized the importance of equal application of law, especially to property owners. In one case, a court declared a statute unconstitutional because of unequal protection.

> "It was a similar type of statute that the court in *Mahon v. County of Sarasota*, 177 So. 2d 665 (Fla. - 1965), struck down as being unconstitutionally discriminatory in that it denied a property owner the equal protection of the law."

PRAYER

WHEREFORE, Petitioner requests that this Court grant this Petition for Writ of Certiorari, and either that the judgment

of the trial court or the Court of Appeals be reversed and rendered or alternatively reversed and remanded for a new trial, in whole or in part; or in the alternative, to remand to the Supreme Court of the State of Texas with instructions to follow said Rule 133 (b) of the Rules of Appellate Procedure of the State of Texas; and that this Court grant any other relief to which Petitioner may be entitled.

Respectfully submitted,

ARCHIE WARD JULIEN, Pro Se
909A Foster
College Station, Texas 77840

(409) 693-8538

CERTIFICATE OF SERVICE

I hereby certify that 3 true and correct copies of the above and foregoing Petitioner's filing has been mailed by certified mail, return receipt requested, to the following attorneys of record: Mr. Michael W. Middleton, 4500 Carter Creek Parkway, Suite 109, Bryan Texas 77802; and Mr. Michael Holt, Capperton, Rodgers & Miller, P.O. Box 4884, Bryan, Texas 77805, on this the _____ day of_____, 19___.

ARCHIE WARD JULIEN

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Appendix for Petitioner

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No. 28,663-272

AGNES S. BAKER	§	IN THE DISTRICT COURT
	§	
VS.	§	OF BRAZOS COUNTY, TEXAS
	§	
ARCHIE JULIEN	§	272ND JUDICIAL DISTRICT

JUDGMENT

On the 18th day of May, 1987, came on to be heard the above-entitled and numbered cause wherein AGNES S. BAKER, as Plaintiff, and ARCHIE JULIEN as Defendant, appeared in person and by their respective attorneys of record and announced ready for trial. No jury having been demanded, all matters of fact and things in controversy were submitted to the Court. The Court, after hearing the evidence and arguments of counsel, makes the following orders:

IT IS ORDERED that Plaintiff have title to and possession of the real property described in Exhibit "A" attached hereto and incorporated by reference the same as if fully set forth at length, (signed for identification) said property being located in Brazos County, Texas.

IT IS FURTHER ORDERED that all other relief not expressly granted herein is denied and that all costs of Court incurred herein are taxed against the party by whom incurred.

SIGNED this 6th day of July, 1987.

(Signed by Judge)
JUDGE PRESIDING

(End page 1)

(Exhibit "A" follows)

FIELD NOTES

0.022 Acre Tract

Being all of that certain tract or parcel of land, lying and being situated in College Station, Brazos County, Texas, and being a part of Lot 14, Block 2 of the COLLEGE HILLS ESTATES - First Installment to the City of College Station, Texas according to a plat recorded in Volume 96, Page 499 of the Deed Records of Brazos County, Texas, and being more particularly described as follows:

BEGINNING: at an iron rod set in concrete at the northeast corner of said Lot 14, same being in the west right-of-way line Walton Ave., also being the southeast corner of Lot 13, Block 2;

THENCE: S 14°20'23" W - 6.85 feet along said Walton Ave. line to an iron rod found for corner;

THENCE: N 75°01'36" W - 235.00 feet across said Lot 14 to an iron rod found for corner;

THENCE: N 0°37'42" W - 1.45 feet to an iron rod set in concrete for corner; same being the southwest common corner between said Lots 13 & 14;

THENCE: S 76°21'12" E - 235.38 feet along the common line between said Lot 13 & 14 to the PLACE OF BEGINNING; and containing 0.022 acres of land, more or less, according to a survey made on the ground under the supervision of Donald D. Garrett, Registered Public Surveyor, No. 2972, on June 16, 1987.

(End Exhibit "A")

Affirmed and Opinion filed September 15, 1988.

(State Seal)

In The

Fourteenth Court of Appeals

NO. C14-87-00630-CV

ARCHIE JULIEN, Appellant

V.

AGNES S. BAKER, Appellee

On Appeal from the 272nd District Court
Brazos County, Texas
Trial Court Cause No. 28,663-272

OPINION

This is an appeal from a judgment in favor Appellee awarding her title to a .022 acre triangular shaped tract of land by virtue of adverse possession. We affirm.

On June 30, 1958, Appellee and her spouse purchased a home in the city of College Station, Texas. The legal description of the property purchased is Lot Thirteen, Block Two, College Hills

Estates, First Installment. At the time they purchased the property Appellee had the land surveyed in order to locate the boundaries of the property. This survey was performed by Mr. J.S. Harrison, a registered public surveyor, and will be referred to as the "Harrison Survey."

(End page 1)

Mr. Harrison installed iron marker pins at the corners of the lot and Appellee used these markers as reference points for the boundaries of the lot when she landscaped her property. She planted a hedge and several trees on the boundary line between her lot and adjoining vacant Lot No. 14. Appellant and her family have continuously maintained, cultivated and used the land within these survey markers since 1958.

In December, 1984, Appellant began negotiations with a third party concerning the purchase of Lot 14, and a portion of Lot 15. Appellant purchased this property in August 1985. Prior to his purchase of this property, Appellant hired Mr. Donald

D. Garrett, a registered public surveyor, to perform a survey. This survey will be referred to as the "Garrett Survey." This survey revealed a discrepancy in the common boundary line between Lot 14 and Appellee's property, Lot 13. Therefore, Appellant knew of the adverse claim prior to his purchase of Lot 14. Appellant brought the discrepancy to Appellee's attention and the ensuing dispute resulted in the present lawsuit when Appellant threatened to erect a privacy fence enclosing the disputed strip of land.

The parties stipulated at trial that Appellee is the owner of Lot 13 and Appellant is the owner of Lot 14 "subject to whatever rights of limitation or adverse possession that Mrs. Baker is able to establish in that the common boundary line between those two lots is the boundary line as determined by Bill Kling and Don Garrett, two separate surveys that have heretofore been made." The case was submitted to the court for determination

and the court rendered judgment for Appellee and awarded her title in the disputed land. Appellant failed to make a timely request for findings of fact and conclusions of law and none were issued by the trial court.

(End page 2)

Appellant asserts five points of error on appeal. In his first two points of error, Appellant alternatively contends there was no evidence or insufficient evidence that Appellee possessed the intent necessary to ripen limitation title to the disputed strip. In his third point of error, Appellant asserts that Appellee judicially admitted that she did not possess the intent necessary to ripen a limitation title.

In a non-jury trial, where no findings of fact or conclusions of law are filed or requested, it will be implied that the trial court made all the necessary findings to support its judgment. *Burnett v. Motyka*, 610 S.W.2d

735, 736 (Tex. 1980). These implied findings may be challenged on appeal by "insufficient evidence" or "no evidence" points the same as a jury's findings and a trial court's findings of fact. *Burnett v. Motyka*, 610 S.W.2d at 736. In resolving no evidence points of error, we consider only that evidence favorable to the judgment and disregard all that which is opposed to it. *International Bank, N.A. v Morales*, 736 S.W.2d 622, 624 (Tex. 1987). However, in reviewing insufficient evidence points, we must consider and weigh all the evidence, including any evidence contrary to the trial court's judgment. *Burnett v. Motyka*, 610 S.W.2d at 736; In *re King's Estate*, 150 Tex. 662, 244 S.W.2d 660 (1952).

TEX. CIV. PRAC. & REM. CODE ANN. § 16.026 (Vernon 1986) states in pertinent part:

> (a) A person must bring suit not later than 10 years after the day the cause of action accrues to recover real property held in peaceable and adverse possession

by another who cultivates, uses or enjoys the property.

Adverse possession is statutorily defined as "an actual and visible appropriation of real property, commenced and continued under a claim of right that is inconsistent with and hostile to the claim of another person. TEX CIV. PRAC. &

(End page 3)

REM. CODE ANN. § 16.021(1) (Vernon 1986). No matter how exclusive and hostile to the true owner the possession of the land may be, the possessor must intend to appropriate it. *Calfee v. Duke*, 544 S.W.2d 640, 642 (Tex. 1976).

Appellant asserts that Appellee's testimony that she believed the disputed tract was in the deed to Lot 13 and never intended to take anyone else's land constitutes a judicial admission that she did not possess the requisite intent. We disagree.

Often the statements of the adverse claimant are, or appear to be, inconsistent. In such instances it is

generally held that a fact issue exists on the issue of his intent to claim the land. *Calfee v. Duke*, 544 S.W.2d at 642; *Pearson v. Doherty*, 143 Tex. 64, 183 S.W.2d 453, 456 (1944); *Stewart v. Luhning*, 134 Tex. 23, 131 S.W.2d 824 (1939); *Payne v. Priddy*, 371 S.W.2d 783, 784 (Tex. Civ. App. - Fort Worth 1963, no writ). The trial court has found all fact issues in favor of Appellee; therefore, it is irrelevant whether her testimony was inconsistent. *Calfee v. Duke*, 544 S.W.2d at 642. Appellee testified she believed the boundary line to her lot was delineated by the surveyor's iron pin markers, and that when she and her husband planted the trees and privet hedge, they located the iron pin markers and ran a string between them, "So we wouldn't plant our shrubbery and trees on the other property." She stated that the purpose of planting the hedge was, "[T]o let our children know that they were not to play on other people's properties, and that was

a line -- we couldn't afford a fence so we put up the shrubbery." She also stated that the water meter installed by the utility company to monitor the water usage for her property was located on the disputed strip of land. On cross-examination, she testified as follows:

> Q: You strung that line where you did because you had no intent to claim any property other than what was described in your Deed; is that not correct?
>
> (End page 4)
>
> A: That was surveyed that way and that's what we were told that's where the property line was. It's our original survey.
>
> Q: Did you ever state to anyone that that property that you were mowing and where your hedges were located, that you were claiming that as your own no matter what?
>
> A: Well, they were mine.

She further testified on rebuttal that it had been her intent all along to use that property and appropriate it for her own use.

It is clear from the record that Appellee did not consider that she was claiming the property adversely to anyone for the simple reason that for 28 years she thought she was the rightful owner of the land.

Further, Appellee manifested this claim of right by open and visible possession and use of the property. The evidence shows that immediately after moving into the house on Lot 13, Appellee and her family began landscaping the yard and planted a privet hedge and trees on the boundary line between Lot 13 and Lot 14 as delineated in the Harrison Survey. They also planted St. Augustine grass up to the boundary line and planted additional shrubbery and flowers on the disputed strip. Since 1958, Appellee has continuously and uninterruptedly cultivated, maintained and used the disputed property to the exclusion of all others. They have mowed the grass, trimmed

the hedges, and pruned the trees and shrubs on the disputed tract.

Mr. and Mrs. Black, previous owners of Lots 14 and 15, lived in a house on Lot 15 for many years. Lot 14 has remained vacant and is entirely overgrown with weeds so that the boundary between the property claimed by

(End page 5)

Appellee and the vacant lot is clearly visible. Appellee testified that at no time did the Blacks question her ownership of the disputed strip of land.

Mr. Adams, who purchased Lots 14 and 15 from Mr. and Mrs. Black's heir, testified that he had not thought about the boundary line but "would have assumed" that the property line between Lots 13 and 14 was at the edge of the area that was mowed and that the hedges and trees would go with Appellee's house.

Ms. Price lives across the street from Appellee. She testified that she often saw Appellee and her family working

in their yard. She stated that she "assumed it was their yard where they had mowed to" and that if she had known that the property line was actually six and one-half feet inside the point to which they mowed, she would have been "put on notice that they were out there cultivating and using some property that didn't belong to them."

Further, Appellant testified that after Mr. Garrett informed him of the discrepancy in the boundary line, he looked at the property and, "It was obvious that they [the Bakers] occupied the land" that lay within that disputed strip.

It has been held that maintaining a pre-existing hedge and mowing grass located on a disputed parcel of land and keeping the land in the condition in which the claimant's grantor kept it do not constitute a hostile character of possession sufficient to give notice of an exclusive adverse possession. *Bywaters v.*

Gannon, 686 S.W.2d 593, 595 (Tex. 1985); *Miller v. Fitzpatrick*, 418 S.W.2d 884, 890 (Tex. Civ. App. - Corpus Christi 1967, writ ref'd n.r.e.); *Surkey v. Qua*, 173 S.W.2d 230, 232 (Tex. Civ. App. - San Antonio 1943, writ dism'd w.o.m.). However, no previous case had addressed the issue of whether planting a hedge is a sufficiently hostile action. We hold that planting a hedge on the asserted property line of the

(End page 6)

tract to create a barrier or "fence" between the properties is a sufficiently permanent, visible and unequivocal act to evidence a hostile character of possession which is sufficient to give notice to the true owner of the claimant's adverse possession.

Therefore, we find Appellee's claim of right, coupled with her actual and visible possession and use of the property, sufficient to satisfy the statutory requirements. Appellee's claim

of right cannot be defeated by her lack of knowledge of the error in the survey or by her failure to realize that there could be other claimants for that strip of land. *Calfee v. Duke*, 544 S.W.2d at 642; *Ybarra v. Newton*, 714 S.W.2d 353, 355 (Tex. App. - Corpus Christi 1986, no writ). Points of error one, two and three are overruled.

In his fourth and fifth points of error, Appellant alternatively asserts that there is no evidence and pleadings, or insufficient evidence and pleadings, to identify or locate the exact dimensions of the tract of land awarded to Appellee by the trial court. We find these contentions entirely without merit. The trial court's judgment states in pertinent part:

> IT IS ORDERED that Plaintiff have title to and possession of the real property described in Exhibit "A" attached hereto and incorporated by reference the same as if fully set forth at length (signed for identification), said property being located in Brazos County, Texas.

Exhibit "A" referred to in the judgment consists of the field notes for a survey of the disputed strip of land conducted under the supervision of Mr. Garrett on June 16, 1987. These field notes recite the lot and block numbers of the property and describe the strip of land by metes and bounds using the concrete monuments noted in the Garrison Survey and the iron pins placed in the ground during the Harrison Survey as reference points.

(End page 7)

The party claiming title by virtue of adverse possession has the burden of alleging or proving a description of the property claimed by them. *Coleman v. Waddell*, 151 Tex. 337, 249 S.W.2d 912, 913 (1952). The claimant must identify the land to establish its location and to show the extent of its interest in the land claimed. *Jones v. Mid-State Homes, Inc.*, 163 Tex. 229, 356 S.W.2d 923, 925 (1962). However, the general test for determining the sufficiency of a description of the

land is whether the tract can be identified with reasonable certainty. *Zobel v. Slim*, 576 S.W.2d 362, 369 (Tex. 1978).

We find that there is sufficient evidence in the record by which the disputed strip of land may be identified with reasonable certainty. The parties stipulated at trial that the correct boundary line between Lots 13 and 14 was that delineated by the concrete monuments reflected in the Kling and Garrett Surveys. Appellee's First Amended Petition alleged that, "It is the Harrison Survey upon which Plaintiff relies for establishment of the boundary lines of the property purchase." Appellee testified that iron pins were placed in the ground to mark the corners of Lot 13 when the Harrison Survey was performed. She further testified that the concrete monuments were established on the property when the Kling Survey was conducted in 1966. She agreed that the disputed strip was the triangle

"formed by the line from the Harrison point to the back, and then back down to the Kling point." Plaintiff's Exhibit 5 depicts this triangular strip of land and clearly notes its boundaries as those delineated by the Harrison Survey and the Kling-Garrison Survey. Both the Harrison Survey and the Garrett Survey were admitted into evidence at trial. We hold that this evidence provides a description of the disputed tract which is sufficient to identify it with reasonable certainty so that it may be located upon the ground. Points of error four and five are overruled.

(End page 8)

Accordingly, the judgment of the trial court is affirmed.

/s/ Ross A. Sears
Justice

Judgment rendered and Opinion filed September 15, 1988.

Panel consists of Justices Junell, Sears and Draughn.

Publish. TEX. R. APP. P. 90.

Fourteenth Court of Appeals
1307 San Jacinto, 11th Floor
Houston, Texas 77002

October 13, 1988

Hon. M. Charles Gandy
2405 Texas Avenue South
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College Station, TX 77840

Hon. Michael W. Middleton
P.O. Box 4884
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Hon. D. Michael Holt
Caperton, Rodgers & Miller
Post Office Box 4884
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RE: CASE NO. 14-87-00630-CV
TRIAL COURT CASE NO. 28,663-272

STYLE: Julien, Archie
V: Baker, Agnes S.

Counsel:

Please be advised that, on this date, the Court OVERRULED appellant's(s') motion for rehearing in the above cause.

Further, application for writ of error, if any, must be submitted on or before Monday, November 14, 1988.

Respectfully yours,

MARY JANE SMART, CLERK

By_____
Deputy

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

February 22, 1989

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RE: Case No. C-8136

STYLE: ARCHIE JULIEN
V. AGNES S. BAKER

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error with the notation, Writ Denied. Petitioner's motion to strike respondent's reply to application is overruled.

Respectfully yours,

Mary M. Wakefield, Clerk

By_____
Deputy

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

May 10, 1989

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RE: Case No. C-8136

STYLE: ARCHIE JULIEN
v. AGNES S. BAKER

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Respectfully yours,

John T. Adams, Clerk

By_____
Deputy

CERTIFICATE OF SERVICE

I hereby certify that 3 true and correct copies of the above and foregoing Petitioner's filing has been mailed by certified mail, return receipt requested, to the following attorneys of record: Mr. Michael W. Middleton, 4500 Carter Creek Parkway, Suite 109, Bryan Texas 77802; and Mr. Michael Holt, Capperton, Rodgers & Miller, P.O. Box 4884, Bryan, Texas 77805, on this the 8th day of September, 1989.

ARCHIE WARD JULIEN